

ISSUE DATE: October 14, 1998

DOCKET NO. P-421/EM-98-471

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ORDER FINDING JURISDICTION AND GROUNDS, GRANTING DISCOVERY,
INITIATING FILINGS AND RESOLVING DISCOVERY DISPUTES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of U S WEST
Communications, Inc.'s Introduction of
MegaBit Services

ISSUE DATE: October 14, 1998

DOCKET NO. P-421/EM-98-471

In the Matter of a Complaint Relating to
U S WEST Communications, Inc.'s
Promotion of its MegaBit Services

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ORDER FINDING JURISDICTION AND
GROUNDS, GRANTING DISCOVERY,
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PROCEDURAL HISTORY

On April 3, 1998, US WEST Communications, Inc. (USWC, U S WEST or the Company) filed tariffs for its "MegaBit Services," which includes "MegaSubscriber" service and "MegaCentral" service. Docket No. P-421/EM-98-471. The tariffs became effective on April 13, pursuant to Minn. Stat. §§ 237.60, subd. 2(f) and 237.63, subd. 4(b). USWC revised its MegaBit Services on April 22.

On July 9, 1998, the Department of Public Service (the Department) filed a complaint regarding USWC's promotion of its MegaBit Service. Docket No. P-421/C-98-997. The next day the Department filed attachments to this complaint, containing copies of a letter and brochure for USWC's "MegaPak," a promotion for a bundle of goods and services, including USWC's MegaBit Services.

On July 17, 1998, USWC stated that it was suspending its MegaBit Service promotion.

On July 21, 1998, the Department filed a letter alleging that USWC had not fully suspended its MegaBit Services promotion.

On September 10, 1998, the Office of Attorney General's Residential and Small Business Utilities Division (OAG-RUD) and the Department (collectively, the Complainants) filed a complaint regarding USWC's MegaBit Service.

On September 17, 1998, the Department filed a Motion to Compel Discovery by USWC.

On September 28, 1998, USWC filed a Motion to Dismiss, Request for Referral to an Administrative Law Judge (ALJ) for Contested Case Proceeding, and a Response to Motion to Compel.

The matter came before the Commission on September 29, 1998.

FINDINGS AND CONCLUSIONS

I. USWC's MegaBit Services

MegaBit services permit high-speed data transmissions even over a conventional access line consisting of a pair of copper wires. USWC offers two "categories" of MegaBit Service: MegaSubscriber and MegaCentral. The price of each service depends upon the data-transfer capacity (bandwidth) selected by the subscriber.

A. MegaSubscriber Service

MegaSubscriber Service is designed to provide a subscriber with faster interactions with an Internet service provider (ISP), for example, or with a workplace computer network.

USWC uses Rate Adaptive Digital Subscriber Line (RA DSL) technology to transmit the data over the copper lines. USWC provides each MegaSubscriber subscriber with devices (e.g., a modem) to be installed at the subscriber's premises that converts continuous (analog) data, such as the sound of a voice, into discrete (digital) data, and visa versa. USWC's Introduction of Megabit Service (April 3, 1998), Exh. A II.C. ("MegaSubscriber Services"). USWC has corresponding equipment at the central office serving the MegaSubscriber subscriber. These devices transmit voice and data over the same lines but in separate frequency bands, thereby permitting the two data streams to be distinguished and processed separately. At USWC's central office, the data is then routed over USWC's data network, whereas the voice is routed over the voice network. USWC's Introduction of Megabit Service (April 3, 1998), Exh. A II.E. ("How DSL Technology Works").

Each MegaSubscriber subscriber must identify a MegaCentral subscriber as its "Destination Channel" from which to receive, and to which to send, data transmissions.

B. MegaCentral Service

MegaCentral is designed to permit ISPs to provide broadband Internet services to subscribers, or to permit telecommuting employees to connect to their employer's computer network. In these examples, each Internet subscriber or telecommuter would need to subscribe to MegaSubscriber.

MegaCentral permits a subscriber to aggregate data streams from many points onto a single high-speed data connection. In contrast to the MegaSubscriber Service, MegaCentral Service cannot be provided over a single pair of copper wires, and USWC uses Asynchronous Transfer Mode (ATM) technology. As a result, each MegaCentral subscriber must purchase a type of private line service to interconnect with USWC. This "MegaCentral Link" might be provided over a DS-1 (1.544 Mbps) or DS-3 (45 Mbps) line.

C. Limitations

USWC does not offer MegaBit Services throughout its service area. USWC has equipped only certain wire centers to provide these services, as set forth in the Network

Disclosure Announcement. Additionally, USWC limits deployment to “customers served by loops, which in the Company’s judgment, are suitable for use with this new technology.” USWC Tariff, Advanced Communications Services Price List, Section 8.2.B.

USWC will not provide MegaSubscriber service to those who do not also subscribe to voice-grade service such as residential service or basic business service. USWC will not provide MegaCentral Service to customers who decline to subscribe for at least a year. *Id.* at 8.3.B.

USWC states that the bandwidth at which a MegaBit subscriber can transmit data depends upon a variety of factors. For this reason, USWC does not warrant the bandwidth at which a subscriber will be able to transmit data.

II. The “MegaPak” Promotion

According to the Department, USWC distributed a letter and brochure promoting USWC’s “MegaPak” beginning around May 8, 1998. The goods and services included in the MegaPak included the Internet service provided by USWC’s unregulated affiliate. The letter and brochure said that people who agreed to buy MegaBit service for a year would also receive the following:

- FREE digital modem (a \$295 value)
- FREE U S WEST.net Internet Access set-up (a \$25 value)
- Professional on site set-up and training at a specially reduced rate of \$110 (an \$85 savings)

That’s over \$400 in savings!

Department Attachment (July 10, 1998). By its terms, the promotion expired on August 14, 1998. *Id.* Commission records in Docket Nos. P-421/EM-98-471 and P-421/C-98-997 contain no notice of this promotion, and no cost studies related specifically to this promotion.

III. Allegations

A. Failure to Give Notice and File Cost Studies

Minn. Stat. § 237.626 provides that —

A telephone company may promote the use of its services by offering a waiver of part or all of a recurring or a nonrecurring charge, a redemption coupon, or a premium with the purchase of a service.... A promotion may take effect the day after the notice is filed with the commission. The notice must identify customers to whom the promotion is available and include cost information demonstrating that the revenue from the service covers incremental cost, including cost of the promotion.

The Department alleges that USWC began its MegaPak promotion without filing a notice with the Commission identifying the customers to whom the promotion is available and

including cost information as required by Minn. Stat. § 237.626.

B. Discrimination in Provision of MegaCentral Service

Minn. Stat. § 237.09 provides that —

A telephone company that offers or provides a service or services, service elements, features, or functionalities on a separate, stand-alone basis to any customer shall provide that service, service element, feature or functionality pursuant to tariff to all similarly situated persons, including all telecommunications carriers and competitors. To the extent prohibited by the Federal Communications Commission or public utilities commission, a telephone company shall not give preference or discriminate in providing services, products, or facilities to an affiliate or to its own or an affiliate's retail department that sells to consumers.

(Emphasis added.) The Complainants allege that USWC began offering its MetaCentral Service at a time when it would be able to fulfill the request from its unregulated affiliate ISP, but before it had enough capacity to accommodate all the foreseeable demand from competing ISPs.

C. Discrimination in Provision of MegaPak Promotion

USWC restricted its MegaPak promotion to only those subscribers who would designate a Destination Channel (e.g., an ISP) that was receiving MegaCentral subscriber before the expiration of the promotion on August 14, 1998. The Complainants allege that this restriction had the effect of benefitting the few ISPs that had early MegaCentral Service — including USWC's affiliate — at the expense of the rest of the ISPs. The Complainants note that USWC charges a subscriber \$45 to subsequently change Destination Channels, which has the effect of locking in the consequences of the MegaPak promotion.

D. Discrimination in Business Office Practices

The Commission has directed USWC to operate the business offices of its regulated services in a manner that does not favor its affiliates, as least as regards marketing intraLATA services.¹

The Complainants allege that USWC has adopted business practices that favor its unregulated affiliate regarding Internet service. Specifically, they allege that —

1. USWC's recorded message for receiving calls from potential MegaSubscriber subscribers does not treat all ISPs equally; rather, it singles out USWC's affiliate for special treatment by saying —

Thank you for calling about MegaBit Services from U S WEST. For MegaBit Services with U S WEST.NET, press 1. For MegaBit Services with

¹In the Matter of an Investigation into IntraLATA Equal Access and Presubscription, Docket No. P-999/CI-87-69 ORDER ESTABLISHING US WEST BUSINESS PRACTICES FOR INTRALATA PRESUBSCRIPTION (January 12, 1996).

any other Internet Service Access Provider, Press 2....

2. USWC markets its ISP affiliate on USWC's site on the World Wide Web, but does not market any other ISP.

E. Service Quality

The Complainants note that "the MegaBit Service Price List does not provide any specificity regarding standards related to the timeliness of installing MegaSubscriber or MegaCentral Service." Complaint (September 10, 1998) at ¶ 40. They also note that "no terms in the MegaBit Service Price List relate to customer specific remedies for the Company's failure to install MegaBit services in a timely manner." *Id.* at ¶ 41. This lack of standards or consequences creates an opportunity for discrimination, according to the Complainants. *Id.* at ¶ 42.

F. Internet Slamming

The Complainants allege that USWC has switched a MegaSubscriber subscriber's Destination Channel to USWC's ISP affiliate without the subscriber's authorization.

G. Restrictions on Resale

The Telecommunications Act of 1996 requires local exchange carriers such as USWC to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4); see also Minn. Stat. § 237.121(5).

The Complainants allege that USWC refuses to provide MegaBit Services at wholesale rates for resale.

IV. Jurisdiction and Grounds for Investigation

Under Commission rules, respondents do not have to answer complaints until the Commission finds that it has jurisdiction over them and that there are reasonable grounds to investigate. Minn. Rules, part 7829.1800, subp. 1. If the Commission makes those two findings, it serves the complaint on the respondent, requires an answer, and handles the case under normal complaint procedures of Minn. Rules, part 7829.1800 *et seq.*

The threshold issues are therefore whether the Commission has jurisdiction over USWC and the conduct alleged, and if so, whether those allegations merit investigation.

A. Jurisdiction

The Commission will take jurisdiction over these complaints pending full briefing and final resolution of USWC's jurisdictional challenge.

Normally, there would be no question as to Commission jurisdiction over these matters. The Commissioner of the Department of Public Service is responsible for the enforcement of Minnesota Statutes chapters 216A and 237. Minn. Stat. § 216A.07, subd. 2. The Public Utilities Commission may adjudicate all proceedings brought before it in which the violation of any law or rule administered by the Department is alleged. Minn.

Stat. § 216A.05, subd. 1.

The Commission has authority to investigate any matter relating to any telephone service. Minn. Stat. § 237A.081, subd. 1. In brief, the current matter alleges the violation of statutes and orders within the Commission's jurisdiction, by a company within the Commission's jurisdiction.

Here, however, USWC asks the Commission to decline jurisdiction in acknowledgment of pending claims at the Federal Communications Commission. This is a complex legal claim requiring thorough briefing. The Commission notes probable jurisdiction and will make a final determination on the jurisdictional issue after the parties have filed legal memoranda.

B. Grounds for Investigation

The Commission finds that there are reasonable grounds to investigate the Complainants' allegations. The Complainants allege the existence of USWC promotional materials combined with the absence of a pre-promotion filing; the existence of a competitive ISP market and USWC's affiliation with one ISP, combined with a lack of standards for USWC to provision competing ISPs with DS-1s and DS-3s; the timing of a promotion that coincides with an alleged capacity shortage, resulting in harm to some ISPs while benefitting USWC's affiliated ISP; apparently unequal treatment in business office practices; allegedly acknowledged Internet slamming; and apparently illegal restrictions on resale. Each of these allegations, if proven, would warrant Commission response. Additionally, the Complainants have filed sufficient documentation to lend credibility to their allegations. The Commission finds reasonable grounds for investigation.

V. Discovery by Complainants

The Department asks the Commission to compel USWC to respond to certain Information Requests (IRs). The Commission will address these IRs in categories.

A. Information Regarding USWC'S Unregulated Affiliate

USWC objects to IR DPS 002 in Docket No. P-421/EM-98-471 and IRs DPS 029 and 034 in Docket No. P-421/C-98-997 because they seek information regarding U S WEST.net, USWC's affiliated, unregulated ISP. IR DPS 002 seeks cost studies which show that Megabit Subscriber Service as provided with free CPE and other benefits is priced above cost. IR DPS 029 seeks information about the compensation plan for Megabit Service sales staff, even if that staff is employed by USWC's unregulated affiliate. IR DPS 034 seeks the number of U S WEST.net Internet customers at the beginning of each month from September 1997 to August 1998.

USWC notes that the Department's discovery authority derives from Minn. Stat. § 216A.07, which permits the Department to —

Inspect ... and copy the books, records, memoranda and correspondence or other documents and records of any person relating to *any regulated business*.

(Emphasis added.) USWC argues that, since U S WEST.net is an unregulated business,

the Department lacks the authority to compel USWC to release information regarding it.

The Department asserts that it has implicit authority to obtain information regarding an affiliate, citing the case of *In re the Application of Northwestern Bell Telephone Company*, 371 N.W.2d 563 (Minn. App. 1985), in which the court acknowledged the Commission's authority to obtain information regarding an affiliated, unregulated yellow pages business.

The Commission finds the Department's arguments persuasive. Therefore, the Commission will direct USWC to provide the information sought by IR DPS 029 and 034. However, the Commission regards IR DPS 002 to be alternatively premature or unduly burdensome, for the following reasons:

Minn. Stat. § 237.626 provides that —

A promotion may take effect the day after the notice is filed with the commission. The notice must identify customers to whom the promotion is available and include cost information demonstrating that the revenue from the service covers incremental cost, including cost of the promotion.

USWC claims to have filed the relevant cost data as part of its April 3 MegaBit filing. The subsequent MegaPak promotion did not require a separate cost study, according to USWC, because USWC was not altering the price of its MegaBit services; the discounts came from the unregulated affiliate. The Department argues that this assertion should not suffice to defeat the need to file a study of the costs of the MegaPak promotion. The issue before the Commission in Docket No. P-421/EM-98-471, then, is whether a telephone company must produce a cost study including unregulated products or services when it offers a promotion that combines regulated services with unregulated products or services.

DPS IR 002, however, demands the remedy requested in that docket without waiting for a ruling on the merits. This demand rests on two arguments. First, the Department asserts that USWC has a duty to produce the study, pursuant to Minn. Stat. § 237.626. Second, the Department argues that such a study is relevant to ascertaining whether USWC is offering its MegaPak below incremental cost, in violation of another provision of Minn. Stat. § 237.626.

The Commission has not yet ruled on the merits of the complaint in Docket No. P-421/EM-98-471. Therefore, granting the relief requested in that docket is premature. In the absence of a ruling on the merits, the Commission is unaware of any statutory duty that USWC produce the cost study. In the absence of a statutory duty to produce such a study, the Commission will decline to require USWC to undertake the burden of producing such a study. In summary, until the Commission becomes convinced that 1) USWC has a statutory duty to produce such a cost study, or 2) the Department's need for the study outweighs the burden of producing it, the Commission will decline to compel USWC to produce the cost study.

B. IRs Which USWC Claims to have Answered

IR DPS 010 asks USWC to state how many MegaSubscriber customers who had placed orders as of the week of July 1, 1998, had switched from an independent Internet service provider to USWC affiliates. USWC responded that it did not have this information. This answer did not satisfy the Department. During the course of oral arguments, however,

the Department suggested that it might be able to support its arguments if it could learn the number of

U S WEST.net subscribers who subsequently signed up for MegaBit service. USWC suggested that it might be able to provide this data. Consequently, the Commission will decline to grant the Motion to Compel regarding IR DPS 010, with the understanding that the parties will continue to explore other ways to accommodate the Department's concerns.

IR DPS 011 asks USWC to state whether it provides customer information to its affiliates, and whether it provides it to non-affiliates; it also asks USWC to identify its policies governing when and how it disseminates this information. USWC answered the IR, but the Department argued that the answer was non-responsive. USWC agreed to supplement its answer within seven days of the date of the oral argument. The Commission will therefore direct USWC to do so.

IR DPS 032 asks USWC to state how many Minnesota MegaSubscriber customers of independent ISPs were incorrectly pointed towards U S WEST.net as of July 17, 1998, and how many U S WEST.net customers were incorrectly pointed towards independent ISPs at the same time. IR DPS 049 asks USWC to state whether it requires a Letter of Authorization for

U S WEST.net as well as from ISPs. In each case, USWC answered the IR, but the Department argued that the answer was non-responsive. During the course of oral argument the Department concluded that these matters might better be addressed by other forms of discovery. The Commission will decline to grant the Motion to Compel regarding IR DPS 032 and 049, with the understanding that the Department believes it has better avenues for acquiring the relevant information.

IR DPS 051 asks USWC to specify the basis upon which it would determine a "normal" provisioning period. USWC answered the IR with reference to another IR answer in which it objected to this usage of the term "normal." The Department argued that the answer was non-responsive. During the course of oral argument, however, USWC offered to provide a list of the factors that influence how long it takes USWC to provide T-1 and DS-3 facilities, and the Department agreed that such a list might be helpful. Consequently, the Commission will decline to grant the Motion to Compel regarding IR DPS 051, with the understanding that USWC will, within seven days of the date of oral argument, provide the Department with a list of the factors that influence the length of time it takes USWC to provide a customer with T-1 or DS-3 facilities.

VI. Subsequent Procedure

A. Discovery by USWC

While the Department and OAG-RUD have standing authority to initiate discovery of information in USWC's control, USWC lacks comparable authority to initiate discovery of the support for the Department's and OAG-RUD's complaint. USWC argues that this situation is inequitable and inappropriate at this stage of the proceedings. The Commission will therefore grant USWC the authority to initiate discovery of the Department and OAG-RUD, beginning September 29, 1998.

B. Subsequent Filings

As of the time of the oral arguments, USWC had not responded to the complaints filed by the Department and OAG-RUD. The Commission will direct USWC to submit its response within 20 days of September 29, which is October 19, 1998.

As noted above, USWC filed a motion to dismiss on September 28, 1998, one day prior to oral arguments. Due to the limited time to review the filing, the Commission and the other parties were not prepared to argue that motion. The Commission will therefore direct parties to respond to USWC's motion in writing by October 14, 1998.

The parties disagreed about the relevance of factual issues to the resolution of some claims. The Department and OAG-RUD characterize certain of their claims as grounded in "policy" in that they do not allege USWC's fault, and seek prospective relief only. The Department and OAG-RUD assert that the Commission may resolve these issues without further factual findings. For example, the Department and OAG argue that the Commission could, without further factual findings, direct USWC to alter a recorded message that first invites MegaSubscriber subscribers to designate USWC's affiliate as their corresponding MegaCentral connection, and only later offers the possibility of designating some other party. USWC argues that the Commission should investigate and find that this practice is anticompetitive or otherwise problematic before directing USWC to make a change. The Commission finds that this matter is not yet ripe for resolution, and will direct parties to identify alleged factual issues still unresolved, and the relevance of those issues to the allegations in the complaints. This Commission will direct parties to submit comments on these matters also by October 14, 1998.

C. Procedure and Schedule

Finally, the Commission will direct parties to propose further procedures and schedule the Commission should adopt for resolving these complaints, to be filed by October 14, 1998.

ORDER

1. The Commission takes jurisdiction over these complaints pending full briefing and final resolution of USWC's jurisdictional challenge.
2. The Commission has reasonable grounds to investigate the allegations raised in these dockets.
3. USWC may initiate discovery against the Complainants.
4. Parties shall file comments within 15 days of September 29, 1998 —
 - responding to USWC's motion to dismiss,
 - identifying any contested factual issues, and the relevance of those issues to the allegations, and
 - setting forth the procedures and schedule the Commission should adopt for resolving these dockets.
5. USWC shall answer the complaint within 20 days of September 29, 1998.
6. USWC shall explain the compensation plan for Megabit Service sales staff, pursuant to IR DPS 029.
7. USWC shall provide the number of U S WEST.net Internet customers at the

beginning of each month from September 1997 to August 1998, pursuant to IR DPS 034.

8. USWC shall supplement, within 7 days of September 29, 1998, its response to IR DPS 011.
9. USWC shall supplement, within 7 days of September 29, 1998, its response to IR DPS 051 by listing the factors that influence the time it takes USWC to provide certain facilities.
10. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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